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(6)

No. 93-723

In The Supreme Court Of The United States

October Term, 1993

UNITED STATES OF AMERICA,
Petitioner,

v.

X-CITEMENT VIDEO, INC.
and RUBIN GOTTESMAN,
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF MORALITY IN MEDIA, INC. FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF THE UNITED STATES AND BRIEF ATTACHED

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25 pp

STATEMENT

Morality In Media, Inc. hereby respectfully moves for leave pursuant to Rule 37 of the Rules Of The Supreme Court Of The United States To File The Attached Brief *Amicus Curiae* in this case. The consent of the Attorney for the Petitioner has been obtained and filed with the court. The consent of the Attorney for the Respondents was requested but has not been received.

THE AMICUS

Morality In Media is a New York not-for-profit interfaith charitable corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States. This organization, now national in scope, has affiliates, chapters and members in various states of the Union. Its Board of Directors and National Advisory Board are composed of prominent businessmen, clergy and civic leaders. Its national headquarters is located at 475 Riverside Drive, New York, New York 10115.

INTEREST OF AMICUS

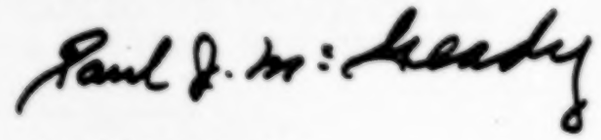
The interest of *Amicus* reflects its continuing interest in the decisions of this Court involving the balancing of constitutional rights and restrictions on obscene material and child pornography. This case involves the validity of a federal child pornography law. Amicus, in the past has been instrumental in supporting and strengthening amendments to the child porn law. In 1983-1984 this organization strongly supported amendments to the child porn law to remove the obscenity requirement and the "for pecuniary profit" language and later strongly objected to an attempted amendment to exempt simulated child porn. We had previously filed an amicus brief with this Honorable Court in *New York v. Ferber*, 458 U.S. 749, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

Morality In Media believes that the brief attached and the relevant case law cited emphasizes the great importance that the Court should give to statement of the sponsor of the amendment to the statute. It further believes that the statement of the sponsor in this case is dispositive of the

legislative intent and perhaps of the controversy, a position that may not be taken by any of the parties.

Morality In Media files this motion and attached brief because it believes that the decision in this case will have a direct and lasting effect on the ability of the United States to eliminate the evil of child pornography. It is our belief that its brief contains relevant matter and case law that may not be brought to the attention of the Court by the parties.

Respectfully submitted,



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INTEREST OF AMICUS

Since its foundation in 1968 Morality In Media has been combatting obscenity and child pornography by constitutional means. It recognizes the importance of the instant litigation to the continuing effectiveness of the federal child pornography laws.

The founder and President of Morality In Media (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography." The Hill-Link Minority Report was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4, 93 S.Ct. 2680, 2684,37 L.Ed.2d 492, 497 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 at 58 n.7, 8, 93 S.Ct. 2628, 2635, 37 L.Ed. 2d 446,457 (1973).

More recently, Morality In Media has participated as Amicus in *Federal Communications Commission v. Pacifica*

Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978); *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989); *Action for Children's Television v. FCC, cert. denied*, 112 S.Ct. 1282 (1992); and *Ferris J. Alexander v. United States*, 113 S.Ct. 2766 (1993).

SUMMARY OF ARGUMENT

Morality In Media first postulates that prior cases indicate that this Honorable Court can and should construe the child porn statute under review to include a guilty knowledge element as to the age of the performer or, more precisely, knowledge that the material is child pornography.

It then suggests that where the law is unclear the Court may, and should, resort to the legislative history and give particular attention to the statement of the Bill's Sponsor.

If the Court decides to read into the statute a mens rea requirement, Amicus suggests that such a guilty knowledge requirement be one that does not mandate that the government produce any extraordinary evidence to conclusively demonstrate the Respondents state of mind but permit it to prove, by reference to facts and circumstances surrounding the case, that Respondents knew they were dealing in child pornography.

ARGUMENT

I

THIS COURT MAY AND SHOULD AUTHORITATIVELY CONSTRUE 18 U.S.C. 2252 TO INCLUDE A REQUIREMENT OF SCIENTER AS TO AGE.

Judge Kozinski, in a concurring opinion in *United States v. O'Mara*, 963 F.2d 1288 at 1294 (9th Cir. 1992), concisely summed up the meaning of prior opinions of this Honorable Court on the right and duty to read a necessary mens rea requirement into a statute when he said:

> "*Morissette*[1] and *United States v. Gypsum*[2] create a rule of statutory interpretation: Courts are to interpret a federal criminal statute, or an element of a federal crime to contain a mens rea requirement unless the structure or language of the statutory text (or perhaps the legislative history) reveals a contrary congressional intent." (Emphasis added).

A pertinent quote from *Gypsum Company* is found in

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[1] *Morissette v. United States*, 342 U.S. 246 72 S.Ct. 240, 96 L.Ed.2d 288 (1952).

[2] *United States v. United States Gypsum Company*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978).

the 1985 *Liparota*[3] case.

> "Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."

The Fifth Circuit in *Standard Oil of Texas*, reiterated the rule that courts may, by construction, import the element of knowledge into criminal statutes.[4]

Following *Smith v. California*[5] many states, as final arbiters of state law, authoritatively construed their obscenity statutes to include a scienter requirement. As early as 1962, the Arizona Supreme Court en banc, in authoritatively construing their statute to include a scienter requirement in *State v. Locks*,[6] said:

> "Since *Smith* was handed down in 1959 the

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[3] *Liparota v. United States*, 471 U.S. 419, 426, 105 S.Ct. 2084, 2088, 85 L.Ed.2d 434, 440 (1985).

[4] *Standard Oil Co. of Texas v. United States*, 307 F.2d 120 126 (5th Cir. 1962).

[5] 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959).

[6] 372 P.2d 724, 725 (Ariz. Sup. Ct. 1962).

highest courts of twelve states have been presented with... the construction to be given an obscenity statute which on its face does not require scienter. In nine of these jurisdictions the statutes have been upheld as impliedly containing the scienter requirement." (Emphasis supplied).

ARGUMENT

II

IN INTERPRETING 18 U.S.C. 2252 THE COURT SHOULD ACCORD SPECIAL RESPECT TO THE STATEMENTS OF THE SPONSOR.

United States v. Walker[7] quotes *Bifulco v. United States*[8] as the authority for the proposition that "where language of the" (criminal) "statute is unclear the legislative history and policies motivating the act should be consulted to discern the meaning of the act."

Pertinent legislative history in the instant case is afforded by the colloquy between Senator Percy and Senator Roth at 123 *Cong. Record* 33,050(1977). Senator Roth, the Sponsor of the Legislation, acknowledged that the term "knowingly" in his amendment meant that the distributor or seller must either have actual knowledge that the materials do

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[7] 514 F.Supp. 294, 302-303 (E.D. La. 1981).

[8] 447 U.S. 381, 391-399, 100 S.Ct. 2247, 2254-58, 65 L.Ed.2d 205, 213-18 (1980).

contain child pornographic depictions or second circumstances must be such that he should have had such actual knowledge.

Morality In Media suggests that this colloquy deserves great weight, and may be dispositive, in determining legislative intent. Sutherland on "*Statutory Construction*" Vol. 2A (1992 Revision), Section 48.15 Page 364 tells us;

> In the course of deliberations on a bill, legislators look to the sponsor and to the representative of the committee in charge of it, to be particularly well informed about its purpose, meaning and intended effect. In recognition of this fact, courts give consideration to statements made by a bill's sponsor ...*United States v. United Mine Workers of America*, 330 U.S. 258 91 L.Ed. 884, 67 S.Ct. 667 (1947); *United States ex rel Chapman v Federal Power Commission*, 345 U.S. 153, 98 L.Ed. 918, 73 S.Ct. 609 (1953); *Galvan v. Press*, 347 U.S. 522, 98 L.Ed. 911, 74 S.Ct. 737 (1954)."

Sutherland warns us that statements by sponsors must be evaluated cautiously in that he or she may sacrifice complete candor by reason of partisan interest in enactment of the bill. Obviously, however, in the instant case, it is extremely unlikely that "partisan interest" colored the remarks of Senator Roth.

Sutherland then informs us (Supplement to 2A Page 56)

that the rule that congressional intent may be inferred from the statement of the sponsor of the bill only applies where the statement is consistent with the statutory language and other legislative history quoting *De Vargas v. Mason & Hanger-Silas Mason Co. Inc.*, 911 F.2d 1377 (10th Cir. 1990) as his authority. *De Vargas* in turn at 1387 cites *Brock v. Pierce County*, 476 U.S. 253, 263, 106 S.Ct. 1834, 1840, 90 L.Ed.2d, 248 (1986) for this principle.

A reference to the *Brock* case at 263 gives us the following quotation:

> "Such statements by individual legislators" (here a Co-Sponsor) "should not be given controlling effect, but when they are consistent with the statutory language and other legislative history, they provide evidence of Congress intent (*Grove City College v. Bell*, 465 U.S. 555, 567 (1984)".

Professor William N. Eskridge, Jr. of Georgetown University Law Center in His article in the U.C.L.A. Law Review[9] makes a strong statement on the importance of reliance on the statements of a bill's sponsor when he writes;

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[9] "*The New Textualism,*" 37 U.C.L.A. Law Review 621,637-38 (1990).

"Next only to Committee Reports in reliability are statements made by sponsors or floor managers and the Court relies on these statements routinely.[10](Emphasis supplied)

In the *Schwegmann*[11] case cited by Professor Eskridge,

we find the following:

"It is to the sponsors that we look when the meaning of the statutory words is in doubt.[12]

At another time this Honorable Court said:

"Remarks... of the sponsor of the language ultimately enacted are an authoritative guide to

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[10] Professor Eskridge quotes as his authority-*See e.g. Public Employees Retirement Sys. of Ohio v. Betts*, 109 S.Ct. 2854, 2867 (1989)...*Jett v. Dallas Independent School District*, 109 S.Ct. 2702, 2711-14 (1989;...*United States v. Taylor*, 108 S.Ct. 2413, 2418 & n.7. (1988);...*Edward J. De Bartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 584-88 (1988);... *Bowen v. Yuckert*, 482 U.S. 137, 152 n.10 (1987); *Piper v. Chris-Craft Indus. Inc.* 430 U.S. 1, 26-27,28-29, 31,34, (1977); *Huddleson v. United States*, 415 U.S. 814, 828 (1974); *Adickes v. S.H. Kress, Co.*,398 U.S. 144, 164 (1970);... *Rodrigue v. Aetna Casualty & Surety, Co.*, 395 U.S. 352, 358, 361-62 (1969); *Waterman S.S. Corp. v. United States*, 381 U.S. 252, 264-66 (1965)... *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

[11] Note 10, supra. at 394-95.

[12] Quoted with approval in *Edward J. De Bartolo* note 10 supra., at 585. *See also, Labor Board v. Fruit Pickers*, 377 U.S. 58 at 66 (1964), *citing, Masto Plastics, Corp. v. Labor Board*, 350 U.S. 270, 288.

the statute's construction.[13]

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[13] *North Haven Board of Education v. Bell*, 456 U.S. 512, 526-27 (1982), quoting *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) "(Such statements) 'deserve to be accorded substantial weight.'"

ARGUMENT

III

THE APPROPRIATE MENS REA IN THIS CASE IS THAT SUPPLIED BY THE SPONSOR OF THE LEGISLATION

As previously above indicated Senator Roth in a colloquy agreed with Senator Percy's assumption "that the term "knowingly" in the proposed amendment meant that "the distributor or seller must have either, first, actual knowledge that the materials do contain child pornography depictions or second, circumstances must be such that he should have had such actual knowledge."

This standard seems to be an appropriate one and is consistent with prior Supreme Court interpretations of the degree of knowledge required to satisfy the requirement of scienter or guilty knowledge.

In *Liporata v. United States*, supra. 471 U.S. 419 at Page 434 the Court said:

> "To prove that petitioner knew that his acquisition or possession of food stamps was unauthorized...the government need not show

> that he had knowledge of specific regulations governing food stamp acquisition or possession. Nor must the Government introduce any extraordinary evidence that would conclusively demonstrate Petitioner's state of mind. Rather, as in any other criminal prosecution requiring mens rea, the Government may prove by reference to facts and circumstances surrounding the case that Petitioner knew that his conduct was unauthorized and illegal."

Finally, Amicus brings the case of *United States v. Sheiner*,[14] to the attention of the Court. In that case at Page 982 we find the following:

> "Criminal intent and guilty knowledge essential elements for conviction...need not be established by direct proof; they may be inferred from the statements and conduct of the defendant."

In that same case at Page 983:

> "If the defendants acted willfully and purposely with evil intent, or with a reckless indifference to the truth, they are chargeable with the requisite knowledge and criminal intent.

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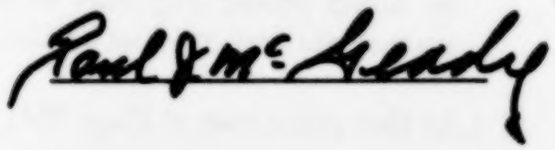
[14] 273 F.Supp. 977 (D.N.Y. 1967) *aff'd.*, 410 F.2d 337 (2d Cir. 1969) *cert denied*, 396 U.S. 825 (1969), 396 U.S. 859 (1969), *sub nom, Piacentile v. United States.*

CONCLUSION

For all of the above reasons, we urge this Honorable Court to interpret the statute as (1) intending a knowledge requirement that the depictions are child pornography (2) which does not necessarily require actual knowledge if circumstances are such that he or she should have had actual knowledge and (3) which knowledge can also be proved by demonstrating a reckless indifference to the truth.

Respectfully submitted,



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